EUROPEAN COURT OF HUMAN RIGHTS

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GRAND CHAMBER JUDGMENT
S. AND MARPER v. THE UNITED KINGDOM

The European Court of Human Rights has today delivered at a public hearing its Grand Chamber judgment[1] in the case of ***S. and Marper v. the United Kingdom*** (application nos. 30562/04 and 30566/04).

The Court held unanimously that:

- there had been **a violation of Article 8** (right to respect for private and family life) of the European Convention on Human Rights;
- it was **not necessary to examine separately the complaint under Article 14** (prohibition of discrimination) of the Convention.

Under Article 41 (just satisfaction), the Court considered that the finding of a violation, with the consequences that this would have for the future, could be regarded as constituting sufficient just satisfaction in respect of the non-pecuniary damage sustained by the applicants. It noted that, in accordance with Article 46 of the Convention, it would be for the respondent State to implement, under the supervision of the Committee of Ministers, appropriate general and/or individual measures to fulfil its obligations to secure the right of the applicants and other persons in their position to respect for their private life. The Court awarded the applicants 42,000 euros (EUR) in respect of costs and expenses, less the EUR 2,613.07 already paid to them in legal aid. (The judgment is available in English and French.)

1. Principal facts

The applicants, S. and Michael Marper, are both British nationals, who were born in 1989 and 1963 respectively. They live in Sheffield, the United Kingdom.

The case concerned the retention by the authorities of the applicants' fingerprints, cellular samples and DNA profiles after criminal proceedings against them were terminated by an acquittal and were discontinued respectively.

On 19 January 2001 S. was arrested and charged with attempted robbery. He was aged eleven at the time. His fingerprints and DNA samples[2] were taken. He was acquitted on 14 June 2001. Mr Marper was arrested on 13 March 2001 and charged with harassment of his partner.

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[1] Grand Chamber judgments are final (Article 44 of the Convention).

[2]. DNA stands for deoxyribonucleic acid; it is the chemical found in virtually every cell in the body and the genetic information therein, which is in the form of a code or language, determines physical characteristics and directs all the chemical processes in the body. Except for identical twins, each person's DNA is unique. DNA samples are cellular samples and any sub-samples or part samples retained from these after analysis. DNA profiles are digitised information which is stored electronically on the National DNA Database together with details of the person to whom it relates.

His fingerprints and DNA samples were taken. On 14 June 2001 the case was formally discontinued as he and his partner had become reconciled.

Once the proceedings had been terminated, both applicants unsuccessfully requested that their fingerprints, DNA samples and profiles be destroyed. The information had been stored on the basis of a law authorising its retention without limit of time.

2. Procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 16 August 2004 and declared admissible on 16 January 2007. The Chamber to which the case was assigned decided to relinquish jurisdiction to the Grand Chamber on 10 July 2007[3].

The National Council for Civil Liberties and Privacy International were granted leave to intervene in the written procedure before the Grand Chamber.

A public hearing took place in the Human Rights building, Strasbourg, on 27 February 2008. The judgment was given by the Grand Chamber of 17 judges, composed as follows:

Jean-Paul **Costa** (France), ***President***,
Christos **Rozakis** (Greece),
Nicolas **Bratza** (United Kingdom),
Peer **Lorenzen** (Denmark),
Françoise **Tulkens** (Belgium),
Josep **Casadevall** (Andorra),
Giovanni **Bonello** (Malta)
Corneliu **Bîrsan** (Romania),
Nina **Vajić** (Croatia),
Anatoly **Kovler** (Russia),
Stanislav **Pavlovschi** (Moldova),
Egbert **Myjer** (Netherlands),
Danutė **Jočienė** (Lithuania),
Ján **Šikuta** (Slovakia),
Mark **Villiger** (Liechtenstein),
Päivi **Hirvelä** (Finland),
Ledi **Bianku** (Albania), ***judges***,

and also Michael **O'Boyle**, ***Deputy Registrar***.

3. Summary of the judgment[4]

Complaints

[3] Under Article 30 of the Convention, where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

[4] This summary by the Registry does not bind the Court.

The applicants complained under Articles 8 and 14 of the Convention about the retention by the authorities of their fingerprints, cellular samples and DNA profiles after their acquittal or discharge.

Decision of the Court

Article 8
The Court noted that cellular samples contained much sensitive information about an individual, including information about his or her health. In addition, samples contained a unique genetic code of great relevance to both the individual concerned and his or her relatives. Given the nature and the amount of personal information contained in cellular samples, their retention *per se* had to be regarded as interfering with the right to respect for the private lives of the individuals concerned.

In the Court's view, the capacity of DNA profiles to provide a means of identifying genetic relationships between individuals was in itself sufficient to conclude that their retention interfered with the right to the private life of those individuals. The possibility created by DNA profiles for drawing inferences about ethnic origin made their retention all the more sensitive and susceptible of affecting the right to private life.

The Court concluded that the retention of both cellular samples and DNA profiles amounted to an interference with the applicants' right to respect for their private lives, within the meaning of Article 8 § 1 of the Convention.

The applicants' fingerprints were taken in the context of criminal proceedings and subsequently recorded on a nationwide database with the aim of being permanently kept and regularly processed by automated means for criminal-identification purposes. It was accepted that, because of the information they contain, the retention of cellular samples and DNA profiles had a more important impact on private life than the retention of fingerprints. However, the Court considered that fingerprints contain unique information about the individual concerned and their retention without his or her consent cannot be regarded as neutral or insignificant. The retention of fingerprints may thus in itself give rise to important private-life concerns and accordingly constituted an interference with the right to respect for private life.

The Court noted that, under section 64 of the 1984 Act, the fingerprints or samples taken from a person in connection with the investigation of an offence could be retained after they had fulfilled the purposes for which they were taken. The retention of the applicants' fingerprint, biological samples and DNA profiles thus had a clear basis in the domestic law.

At the same time, Section 64 was far less precise as to the conditions attached to and arrangements for the storing and use of this personal information.

The Court reiterated that, in this context, it was essential to have clear, detailed rules governing the scope and application of measures, as well as minimum safeguards. However, in view of its analysis and conclusions as to whether the interference was necessary in a democratic society, the Court did not find it necessary to decide whether the wording of section 64 met the "quality of law" requirements within the meaning of Article 8 § 2 of the Convention.

The Court accepted that the retention of fingerprint and DNA information pursued a legitimate purpose, namely the detection, and therefore, prevention of crime.

The Court noted that fingerprints, DNA profiles and cellular samples constituted personal data within the meaning of the Council of Europe Convention of 1981 for the protection of individuals with regard to automatic processing of personal data.

The Court indicated that the domestic law had to afford appropriate safeguards to prevent any such use of personal data as could be inconsistent with the guarantees of Article 8 of the Convention. The Court added that the need for such safeguards was all the greater where the protection of personal data undergoing automatic processing was concerned, not least when such data were used for police purposes.

The interests of the individuals concerned and the community as a whole in protecting personal data, including fingerprint and DNA information, could be outweighed by the legitimate interest in the prevention of crime (the Court referred to Article 9 of the Data Protection Convention). However, the intrinsically private character of this information required the Court to exercise careful scrutiny of any State measure authorising its retention and use by the authorities without the consent of the person concerned.

The issue to be considered by the Court in this case was whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was necessary in a democratic society.

The Court took due account of the core principles of the relevant instruments of the Council of Europe and the law and practice of the other Contracting States, according to which retention of data was to be proportionate in relation to the purpose of collection and limited in time. These principles had been consistently applied by the Contracting States in the police sector, in accordance with the 1981 Data Protection Convention and subsequent Recommendations by the Committee of Ministers of the Council of Europe.

As regards, more particularly, cellular samples, most of the Contracting States allowed these materials to be taken in criminal proceedings only from individuals suspected of having committed offences of a certain minimum gravity. In the great majority of the Contracting States with functioning DNA databases, samples and DNA profiles derived from those samples were required to be removed or destroyed either immediately or within a certain limited time after acquittal or discharge. A restricted number of exceptions to this principle were allowed by some Contracting States.

The Court noted that England, Wales and Northern Ireland appeared to be the only jurisdictions within the Council of Europe to allow the indefinite retention of fingerprint and DNA material of any person of any age suspected of any recordable offence.

It observed that the protection afforded by Article 8 of the Convention would be unacceptably weakened if the use of modern scientific techniques in the criminal-justice system were allowed at any cost and without carefully balancing the potential benefits of the extensive use of such techniques against important private-life interests. Any State claiming a pioneer role in the development of new technologies bore special responsibility for striking the right balance in this regard.

The Court was struck by the blanket and indiscriminate nature of the power of retention in England and Wales. In particular, the data in question could be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; the retention was not time-limited; and there existed only limited possibilities for an acquitted individual to have the data removed from the nationwide database or to have the materials destroyed.

The Court expressed a particular concern at the risk of stigmatisation, stemming from the fact that persons in the position of the applicants, who had not been convicted of any offence and were entitled to the presumption of innocence, were treated in the same way as convicted persons. It was true that the retention of the applicants' private data could not be equated with the voicing of suspicions. Nonetheless, their perception that they were not being treated as innocent was heightened by the fact that their data were retained indefinitely in the same way as the data of convicted persons, while the data of those who had never been suspected of an offence were required to be destroyed.

The Court further considered that the retention of unconvicted persons' data could be especially harmful in the case of minors such as the first applicant, given their special situation and the importance of their development and integration in society. It considered that particular attention had to be paid to the protection of juveniles from any detriment that could result from the retention by the authorities of their private data following acquittals of a criminal offence.

In conclusion, the Court found that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, failed to strike a fair balance between the competing public and private interests, and that the respondent State had overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention in question constituted a disproportionate interference with the applicants' right to respect for private life and could not be regarded as necessary in a democratic society. The Court concluded unanimously that there had been a violation of Article 8 in this case.

Article 14 in conjunction with Article 8
In the light of the reasoning that led to its conclusion under Article 8 above, the Court considered unanimously that it was not necessary to examine separately the complaint under Article 14.

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The Court's judgments are accessible on its Internet site (http://www.echr.coe.int).

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